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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,

v.

ISIDRO SAMUEL REYES,
Defendant and Appellant.

(Super. Ct. No. SA018604)

COURT OF APPEAL — SECOND DIST.
FILED JAN 11, 2000

JOSEPH A. LANE Clerk
Deputy Clerk

THE COURT:*

Appellant and defendant Isidro Samuel Reyes appeals from the judgment entered following a jury trial which resulted in his conviction on one count of possession of cocaine base for sale. (Health & Saf. Code, § 11351.5; Pen. Code, § 1203.073, subd. (b)(5).) Appellant was sentenced to a total prison term of seven years.

*KLEIN, P.J. KITCHING, J. ALDRICH, J.

Appellant contends the trial court erred in denying his motion for a new trial based upon allegations of juror misconduct. The motion was supported by statements from one juror that, outside the presence of the other jurors, he had used a coin to assist him in deciding how to vote. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

On July 16, 1994, appellant was in the Mar Vista Housing Project in Culver City. When appellant saw a police officer approach, he threw plastic bags onto the roof of a building. The bags contained cocaine. When arrested, appellant had two $100 bills and two $20 bills.

2. *Procedure.*

In a bifurcated proceeding, appellant was convicted by jury of one count of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) in an excess amount, within the meaning of Penal Code section 1203.073, subdivision (b)(5). Thereafter, the trial court found it true that appellant had previously been convicted of a violation of Health and Safety Code section 11351, within the meaning of Health and Safety Code section 11370.2, subdivision (a).

Appellant was sentenced to a total prison term of seven years.

Appellant made a motion for a new trial. The motion papers included declarations from appellant's trial counsel. These declarations were filed between November 28, 1995 and January 18, 1996. In these declarations, appellant's trial counsel declared the following. Trial concluded on November 7, 1995. Jury deliberations lasted until 3 p.m. on November 9, 1995, at which time appellant was found guilty.

After the jury was excused, trial counsel had a conversation with Mr. Juan J., one of the jurors. Another juror, Mr. Shakeed F., approached to discuss the case. During this conversation, Mr. Shakeed F. said he voted for guilt because he was pressured into doing so and because it was his last day of jury service. Mr. Shakeed F. further stated that before lunch he was the only juror who did not vote guilty. After lunch Mr. Shakeed F. voted guilty because of pressure from the other jurors. Mr. Shakeed F. still believed appellant was not guilty.

Appellant's investigator declared Mr. Shakeed F. had also told the investigator about succumbing to pressure during deliberations.

On February 15, 1996, appellant's counsel filed a supplemental declaration. Appellant's counsel attested Mr. Shakeed F. had stated the following. Mr. Shakeed F.'s "vote of guilt was not based on his true belief .... Despite [Mr. Shakeed F.'s] adamant position that [appellant] was not guilty, he nevertheless voted with the rest of the jurors rather than run the risk of further self-depreciation." Mr. Shakeed F. felt inferior and kept to himself. "On the last day of deliberation two jurists felt that [appellant] was not guilty. The eleventh jurist ultimately sided with the other then jurists leaving [Mr. Shakeed F.] the lone holdout." "Now, being the lone voice of innocence created by the type of pressure which he could not tolerate. At the lunch break of the Friday on which the verdict was rendered [Mr. Shakeed F.] went to his car to eat alone .... He knew that he had to make a decision one way or another. Yet, he still felt that [appellant] was not guilty based on the evidence presented. On the one hand he felt that he had to arrive at a decision for the benefit of the other jurists, on the other hand he did not agree with the guilty verdict. [Mr. Shakeed F.] felt that the only way out of this predicament was to **flip a coin!!** Depending the side on which the

coin fell determined whether he voted guilty or not guilty."[1] (Original emphasis.)

A hearing was held on February 23, 1996. Mr. Shakeed F. was sworn and testified to the following. During the lunch break he was alone, in his car. He used the coin to assist him in a "corporate decision," a "decision not being biased." He decided that if the coin landed on heads, he would vote "guilty." If the coin landed on tails, he would vote not guilty. Since the coin landed on heads, he flipped the coin again. It landed on heads again. After lunch, he rejoined the other jurors. They were waiting for his decision, as the rest of the panel "knew which direction they were going." Earlier in the day, he had suggested the jury inform the trial court the jury was hung, 11-1. However, the other jurors requested he listen to what they had to say. After lunch, the jury was in the jury room for an hour and a half. The verdict was rendered and the jury polled. He voted guilty because he "went along with the flow." He talked to defense counsel after trial and subsequently to an investigator. However, he did not mention the flipping the coin until months later.

The trial court asked for supplemental briefing. In appellant's supplemental briefs, appellant argued a chance verdict, such as flipping a coin, constituted improper conduct warranting a new trial.

The People's supplemental brief contended appellant had not met his burden of proof. The People suggested Mr. Shakeed F.'s testimony was not credible because his statements were inconsistent and he had not mentioned flipping the coin until months after the conviction. The People also argued that even if Mr. Shakeed F. used a coin in his thinking process, this was not the decisive fact because Mr. Shakeed F. continued to deliberate with the jurors for one and one-half hours after the coin was flipped.

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[1] Appellant's counsel referred to Mr. Shakeed F. as "Mr. Shaheed."

The People further argued Mr. Shakeed F. simply was pressured into voting. According to the People, the flip of the coin merely provided Mr. Shakeed F. with a rationalization for succumbing to the pressure.

A declaration from juror Mr. David M. revealed the following[2]. After the verdict, Mr. Shakeed F. discussed the matter with appellant's counsel. Mr. Shakeed F. was profoundly affected when he heard appellant's counsel discuss "many points that were not brought out in the trial. . . . [Mr. Shakeed F.] seemed to be expressing doubts about his decision based on this discussion. The defense attorney's point were interesting, provocative, and biased. They should have been brought up in court if true. [Mr. Shakeed F.] seemed to accept them as facts."

The trial court denied appellant's motion for a new trial. For purposes of ruling on the motion, the trial court accepted the fact that Mr. Shakeed F. flipped a coin and thus the trial court did not decide the issue on credibility. The trial court concluded the situation was no different from cases in which jurors changed their minds and there was an attempt to impeach the verdict with evidence of those jurors' subjective mental processes. The trial court ruled, "A coin toss for a single individual, which basically would indicate there was no decision-making process going on, but it is the juror's subjective process that we are looking into in evaluating the validity of this verdict; and that is the area of inquiry which I think we are precluded in doing as a matter

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[2]The trial court permitted the prosecution to submit a letter which would be sent to jurors asking for facts with regard to jury deliberations. The letter said in part, "[ ] told the Court that he was the last juror to decide to vote guilty. We would like to know if [ ] returned from the lunch break on the last day of the trial prepared to vote guilty, or instead, whether he changed his position after the lunch break and following more deliberations." The record on appeal contains information from only one juror in addition to the submitted by Mr. Shakeed F.

of law. [¶] . . . [¶] It would be peculiar to me that, if a juror came back and said, 'I only voted guilty because I was under pressure and I wanted to go home and it was Friday' that that would be invalid, and we would be unable to review that verdict but, if a juror came in and said, 'I only voted guilty because I flipped a coin,' that that one would be automatically kicked out and the other we couldn't even look at. [¶] It is one juror's effort to impeach the verdict based on their own decision-making process, and that can't be done." "Analytically, I don't regard that as being any different from 'I did it because I was under pressure; I did it because I was tired; I did it because I wanted to go home. I did it for any other reason other than an analysis of the evidence.' "

Appellant's motion for reconsideration was denied. He appeals from the judgment.

DISCUSSION

The only issue raised is whether the flipping of a coin by Mr. Shakeed F. constituted a chance verdict and thus the motion for a new trial should have been granted. We conclude there was no chance verdict. Thus, the trial court did not err in denying the new trial motion.

Evidence Code section 1150 states the general rule in California regarding the submission of juror affidavits to impeach a verdict. Jurors are competent to testify to objective facts occurring inside or outside the jury room. However, there can be no examination of juror's mental processes.[3] Verdicts cannot be upset by statements by indi-

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[3]Evidence Code section 1150 reads: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a

vidual jurors as to their motives and reasons for entering a particular vote. This rule protects the finality of verdicts and the sanctity of jury deliberations. It is summarized in *In re Stankewitz* (1985) 40 Cal.3d 391 at page 398: "jurors may testify to 'overt acts' — that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' — but may not testify to 'the subjective reasoning processes of the individual juror. . . .' (*People* v. *Hutchinson* [(1969) 71 Cal.2d 342] 349-350.)"

There are limited exceptions to the general rule prohibiting inquiry into the minds of jurors. One exception is that juries are not permitted to decide a case by chance or lot. (Pen. Code, §1181 subd. 4; Code Civ. Proc., § 657, subd. 2.) Affidavits of jurors are admissible to overturn a verdict to show a case was decided by tossing a coin, by drawing papers out of a hat, as a result of a game of chance or by casting a die. (*People* v. *Hall* (1980) 108 Cal.App.3d 373, 380; *People* v. *Richards* (1905) 1 Cal.App. 566, 570; c.f. *Wright* v. *Abbott* (Mass. 1894) 36 N.E. 62 [ballots put in a hat].)

A more sophisticated chance verdict device is the prohibited quotient verdict where jurors agree to average their views. It has been improperly used by juries in civil cases to determine the amount of damages and in criminal cases to determine the duration of a sentence or the amount of a fine.[4] (C.f. *Chronakis* v. *Windsor* (1993) 14 Cal.App.4th 1058, 1064-1068 [civil case]; *Williams* v. *State* (Ark. 1899) 50 S.W. 517, questioned in *Lin Manufacturing Company of Arkansas* v. *Courson* (Ark. 1969) 436 S.W.2d 472, 474, [criminal case].) A quotient verdict is one in which the jury

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juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

[4]In California, sentences are determined by the court.

agrees that each individual will arrive at a verdict (e.g., a damage award), the individual decisions will be added together, and then the total will be divided by 12 to arrive at the quotient verdict. However, there is no quotient verdict if a similar procedure is followed, but there was no antecedent agreement. "[I]t is not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote upon it, even if they agree upon that amount." (*Will* v. *Southern Pacific Co.* (1941) 18 Cal.2d 468, 478; *Chronakis* v. *Windsor, supra,* 14 Cal.App.4th at pp. 1064-1066, citing among others, *Dixon* v. *Pluns* (1893) 98 Cal. 384.)

Quotient verdicts, like other verdicts based on chance, are improper because the jury agrees to a decision which is entirely uncertain and unknown at the time the agreement is made, "as though the whole matter were decided by the casting of a die, or the tossing of a coin." (*Dixon* v. *Pluns, supra,* 98 Cal. at p. 387.) Thus, if the mathematical computation is used merely as a working tool and each juror thereafter independently agrees to that result, there is no misconduct. (*City of Pleasant Hill* v. *First Baptist Church* (1969) 1 Cal.App.3d 384, 433-435; *Balkwill* v. *City of Stockton* (1942) 50 Cal.App.2d 661, 671-672, distinguished on other grounds in *Brown* v. *Poway Unified School Dist.* (1993) 4 Cal.4th 829, 831.)

In some cases discussing verdicts by lot or chance, there is a dispute as to whether or not there was an antecedent agreement and the influence of that agreement on one or more jurors. In those cases, some jurors attest that the verdict was based upon a mathematical formula, while other jurors attest the formula was used merely as a tool to assist in the decisionmaking process. If a juror believed there was an agreement and was induced to assent to the verdict because of that belief, some courts conclude the verdict must be reversed. (E.g., *Gordon v. Trevarthan* (Mont.

1893) 34 P. 185 [discussing a statute virtually identical to Code of Civil Procedure section 657].) Others conclude reversal is not required. (E.g., *Maryland Casualty Co. v. Gideon* (Tex.Civ.App.1948) 213 S.W.2d 848, 851 [one juror assented to verdict because he believed there was an agreement to be bound; "there was no overt act of misconduct and such testimony could merely constitute the mental process by which [one juror] arrived at the verdict and is insufficient to destroy it."].) The only decision we have found in California which touched this point is *Levy v. Brannan* (1870) 39 Cal. 485. In *Levy*, it appears a portion of the jury agreed to fix damages by a resort to chance. The verdict was set aside because a portion of the jurors were "induced to asset to a verdict . . . by drawing lots." (*Id.* at p.489.)[5]

Penal Code section 1181 permits the trial court in criminal cases to grant a new trial "[w]hen the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors[.]" (Pen. Code, § 1181, subd. 4.) Code of Civil Procedure section 657 also codifies California's prohibition of chance verdicts and specifically permits the testimony of one juror to be used as evidence to prove the verdict was arrived in such a manner. Code of Civil Procedure section 657 is more detailed than its criminal counterpart and states in pertinent part: "The

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[5]The focus on an individual juror arises in one other related arena. To reverse after jury misconduct has been found, prejudice must be shown. (*In re Malone* (1996) 12 Cal.4th 935, 963; *People v. Perez* (1992) 4 Cal.App.4th 893, 906.) In discussing prejudice, courts state that "[w]hen the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the [detriment of the party alleging error], we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial." (*People v. Marshall* (1990) 50 Cal.3d 907, 951; *In re Malone, supra,* 12 Cal.4th at pp. 963-964.)

verdict may be vacated and . . . a new or further trial granted on all or part of the issues . . . for any of the following causes, materially affecting the substantial rights of such party:

"..... .....

"2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors."

There does not appear to be a difference between a "verdict . . . decided by lot" as used in Penal Code section 1181 and the "resort to the determination of chance" as specified in Code of Civil Procedure section 657. There are few criminal cases discussing the subject and these cases use the terms together, as if they were interchangeable. The criminal cases have little discussion and usually simply state verdicts by chance or lot are not permitted, or the facts presented in that case do not constitute a verdict by chance or lot. (E.g., *People* v. *Kromphold* (1916) 172 Cal. 512, 524-525; *People* v. *Soap* (1899) 127 Cal. 408, 411; *People* v. *Azoff* (1895) 105 Cal. 632, 634, distinguished in *People* v. *Hutchinson, supra,* 71 Cal.2d at pp. 347-348; *People* v. *Richards, supra,* 1 Cal.App. at p. 570.) Also, the Civil Code provision has been applied in criminal cases. (E.g., *People* v. *Sherman* (1950) 97 Cal.App.2d 245, 256; *People* v. *Azoff, supra,* 105 Cal. at p. 635) Further, differences in the two statutes appear to be insignificant. For example, even though Penal Code section 1181 does not explicitly state juror(s) affidavits may be used to prove a decision was by chance or lot, while the civil code is explicit in this regard, other authorities makes this point in a criminal context. (Evid. Code § 1150; *People* v. *Hall, supra,* 108 Cal.App.3d at p. 380; *People* v. *Cook,* (1955) 136 Cal.App.2d 442, 446.)

Here, appellant contends there was a chance verdict because one juror, Mr. Shakeed F., tossed a coin. Appellant focuses on the language in Civil Code section 657 which states a new trial may be granted when "one or more jurors have been induced to assent . . . by a resort to the determination of chance". By focusing on this language, however, appellant misses the mark and demonstrates a misunderstanding of the basic premise of a "chance verdict" or a "verdict by lot." Such verdicts results from the jury's *agreement in advance* to be bound by a result reached by a methodology which resorts to chance.[6] (*Sunset Brick & Tile, Inc.* v. *Miles* (Tex.Civ.App. 1968) 430 S.W.2d 388, 392.) A verdict by chance or lot does not refer to the mental processes of *one* juror, in isolation from his or her fellow jurors. If the jury panel uses some tool, such as a coin, the roll of a dice, or a mathematical formula, to assist it in reaching a conclusion, but there was no antecedent agreement to use that result as the verdict, there is no impropriety. If there is no antecedent agreement, the verdict was not a "verdict by chance or lot."

Even in situations discussing the impact of one or more jurors being "induced to assent" by the chance methodology, there is no dispute that either the entire jury panel or a portion of the panel agreed to use a chance methodology in the decisionmaking process. The only evidence before us is that *one* juror used a verdict to assist him in his decisionmaking process. There are no facts before us which show there was an agreement among the jurors to abide by the toss of a coin or Mr. Shakeed F. believed there was an agreement to be bound by a coin toss.[7]

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[6]"Chance" has been defined as "hazard, risk, or the result or issue of uncertain and unknown conditions or forces." (*Dixon* v. *Pluns, supra,* 98 Cal. 384 at p. 387.)

[7]Since the trial court did not decide the case based upon the credibility of Mr. Shakeed F., we have no reason to discuss situations in

Here, one juror used a coin toss to assist him in voting. It appears this aided his decision to give into the majority. Deciding to acquiesce to the vote of the majority does not result in a chance verdict. (CF, *People* v. *Sherman, supra,* 97 Cal.App.2d at pp. 256-257; *People* v. *Cook, supra,* 136 Cal.App.2d at p. 446 [juror succumbing to pressures does not violate Penal Code section 1181, subd. 4].)[8] Further, after flipping the coin, Mr. Shakeed F. rejoined the rest of the jury and deliberations continued for another one and one-half hours. Additional deliberations demonstrate the vote was independent of the coin toss. Thus, the information contained in the motion for new trial reveals Mr. Shakeed F.'s mental processes. The information reflects on his subjective concerns and the mental processes he used to overcome those concerns.

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which affidavits are not believed or there are contradictory affidavits. (E.g. *Bunker* v. *City of Glendale* (1980) 111 Cal.App.3d 325, 329.)

[8]We have found few cases which deal with verdicts based upon flipping of a coin. (*Vaise v. Delaval* (1785 K.B.) 1 T.R. 11 [99 Eng.Rep.944].)

Schwindt v. Graeff (Ohio 1924) 142 N.E. 736 involved a situation in which one juror tossed a coin to assist that juror in making a decision. The Supreme Court of Ohio concluded the judgment could not be set aside because jurors' declarations were not admissible, noted the case strained the general rule to the breaking point, and suggested the legislature could enact laws to modify or abrogate that rule. There was no statute permitting misconduct be proven by affidavit and there was no discussion as to whether the juror's act constituted a chance verdict.

In *Crawford v. Consolidated Underwriters* (Tex.Civ.App. 1959) 323 S.W.2d 657, the jury deadlocked on whether plaintiff should receive $1,250 or $1,450. To resolve the impassed, the jury "agreed to flip a coin and abide the result." (*Id.* at p. 658.) Thereafter, the jury answered the issues in a manner which would entitle plaintiff to that amount. Acknowledging the agreement to abide by the toss of a coin was flagrant misconduct, the court refused to reverse the judgment on that ground because plaintiff benefited from that position. (*Id.* at 659) The court held, however, it was reversible error to answer the questions in a manner consisted with that flip. (*Id.* at p. 659.)

While the method used by Mr. Shakeed F. may be disturbing, and is indeed unorthodox, it does not constitute a chance verdict or one determined by lot. Were we to examined Mr. Shakeed's reasons for voting, we would be probing the mental processes of this one juror, something which we are prohibited from doing.

DISPOSITION

The judgment is affirmed.

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